INDEX

CITATIONS

431187—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM R. JOHNSON

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACK SOMMERS, JAMES A. HARTIGAN, JOHN M. FLANAGAN, WILLIAM P. KELLY AND STUART SOLOMON BROWN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Seventh Circuit (R. 222), reversing convictions under Section 145 (b) of the Revenue Acts of 1934, 1936, and 1938.

OPINIONS BELOW

The majority and dissenting opinions (R. 180-222) in the court below, and its opinion on rehearing (R. 223) are not yet reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered September 15, 1941 (R. [illegible]). A petition for rehearing was denied on November 6, 1941 (R. [illegible]). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

QUESTIONS PRESENTED

The respondents were convicted of criminal violations of the income-tax laws. The court below reversed upon a variety of grounds which appear to raise the following principal questions:

1. Whether the indictment or any part thereof was void.

2. Whether it was incumbent upon the Government to offer proof in support of the allegation of the indictment that the grand jury was properly constituted.

3. Whether any of the counts were duplicitous or invalid by reason of inconsistency.

4. Whether the evidence sustained the convictions.

The form of the opinion reversing the judgments [illegible] to spell out clearly all of the issues that are squarely in the case. We believe the foregoing questions presented outline generally the issues involved but they are not intended in any way to limit the petition. It is the Government's position that the reversal below was improper in all grounds however framed.

5. Whether the examination of the expert witness Clifford invaded the province of the jury.

STATUTES INVOLVED

The relevant provisions of the statutes involved are set forth in the Appendix, *infra*, pp. 24–26.

STATEMENT

On March 29, 1940, an indictment in five counts was returned against the respondents and others[1] (R. 2–25). The first four counts charged the defendant Johnson with willful attempts to defeat and evade a large part of his income taxes for the calendar years 1936–1939, inclusive, and charged the co-defendants with willfully aiding and abetting, etc., Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy.

The theory of the prosecution was that Johnson owned various gambling places in and around Chicago from which he derived large amounts of unreported income and that other respondents pretended to own such places thereby concealing his financial interest therein. R. 63–109. Johnson was identified with the gambling houses in a variety of ways, and it was shown that the houses

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[1] Upon motion of the United States Attorney the case was dismissed as to four of the defendants. R. 143, and three other defendants were found not guilty on all of the counts. R. 144.

operated as a unit, maintaining a central clearing-house with private interconnecting telephones (Bill of Exceptions, Vol. I, pp. 40–42, 48–52, 56–57, 73–84, 94–97, 123, 128–131, 150–158, 174–192, 195–205, 225–228, 234–240, 276–278, 283–292, 305–306, 306–307, 349–372, 411–412, 419–434, 476–500). The fact that his actual income was greatly in excess of the amounts reported was confirmed by showing that during the years in question he purchased various properties and made other expenditures aggregating far more than his available resources based upon admitted assets and reported income. (Bill of Exceptions, Vol. I, pp. 5–10, 36, 49, 51, 56–62, 81, 84, 417, 741–742).

Some of the codefendants were acquitted, but Johnson and the remaining respondents were found guilty.[3] Johnson was sentenced to imprisonment for five years and fined $10,000.[4] The other respondents were given lesser sentences and fines (R. 155–162).

The Circuit Court of Appeals, Judge Evans dissenting, reversed the judgments upon a variety of grounds. It is not entirely clear from the lengthy opinion what part each ground played in the re-

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[3] Johnson, Sommers, Hartigan, Flanagan, and Kelly were found guilty on all five counts; Brown was found guilty only on the third, fourth, and fifth counts (R. 152).

[4] He was sentenced to imprisonment for five years on each of the first four counts and two years on the fifth count, the terms to run concurrently; he was fined $10,000 on each count, but with the provision that payment of one $10,000 fine should discharge all fines (R. 154–155).

versal, but as we read the opinion we believe its action was based upon the following considerations:

1. The court held that the entire indictment was void, since it was not returned by a legally constituted grand jury by reason of an allegedly invalid order of continuance. The grand jury was impaneled during the December 1939 term of the District Court of the Eastern Division of the Northern District of Illinois (R. 2, 28, 32).[1] By order dated January 24, 1940, during the December term, the grand jury was authorized to sit during the February 1940 term to finish investigations begun but not finished during the December term. No question is raised as to the legality of the grand jury as originally impaneled or as continued into the February term. On February 28, 1940, the District Court entered a further order extending the life of the grand jury into the March term, reading as follows (R. 28–29, 32–33):[2]

> Now comes the Second December Term, 1939 Grand Jury for the Northern District of Illinois * * * and * * * requests

[1] Section 152 of Title 28, U. S. C., Supp. V, provides that the terms of the District Court for the Eastern Division of Illinois shall be held on the first Mondays in February, March, April, May, June, July, September, October, and November, and the third Monday in December.

[2] Both the January 24 and the February 28 orders of continuance were based upon Sec. 421, Tit. 28, U. S. C., Supp.

> that an order be entered authorizing them, the said Second December, 1939 Grand Jury, heretofore authorized to sit during the February 1940 Term of this Court, to continue to sit during the Term of Court succeeding the said February Term of Court, to-wit, the March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court;
>
> It is Therefore Ordered That the Second December 1939 Grand Jury, now sitting in this Division and District, be and it is hereby authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing said investigations.

The indictment was returned on March 29, 1940, during the March term and its preamble alleged (R. 2):

> The Grand Jurors * * * at the December Term * * * having begun but not

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V. (Sec. 284, Judicial Code, as amended, c. 746, 50 Stat. 748), which provides:

"* * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms. * * *"

These provisions were subsequently amended (c. 101, 54 Stat. 110) by changing the words "three terms" to "eighteen months."

> finished during said December Term of Court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court * * * during the February and March Terms of said Court for the purpose of finishing investigations begun but not finished during said December Term of Court * * *.

Johnson filed a motion to quash the indictment (R. 28–31) and the other defendants filed a plea in abatement "in the nature of a motion to quash" (R. 32–35), in each of which it was charged in substantially identical language that the order continuing the grand jury into the March term was void. The District Court overruled the motion to quash and granted the Government's motion to strike the plea in abatement (R. 45–46), but the court below held that the motion to quash and the so-called plea in abatement should have been sustained. In reversing the judgment it held that the order continuing the grand jury into the March term was void, on the ground that it authorized the grand jury to continue investigations begun in the February Term whereas under the statute the grand jury could be continued only to complete investigations begun in its original term. However, the Government contested that interpretation of the order and contended that in any event, no new investigation had been begun in February. The record affirmatively discloses that the investigations were

begun during the December session.[7] (Bill of Exceptions, Vol. II, pp. 614–692.) See also *United States* v. *Brown*, 116 F. (2d) 455, 456 (C. C. A. 7th), involving a contempt proceeding against one of the respondents herein with respect to testimony before the grand jury as to these very matters in which it also appears that the investigations leading up to the indictment herein were commenced during the December term.

2. The court held further that even if the order of continuance were valid, the grand jury failed to comply with the order, for it in fact undertook a new investigation in the March term, witness the count relating to Johnson's 1939 taxes. The court ruled that the Government's motion to strike should have been overruled and the Government required to answer (R. 187–190).

3. Although the indictment itself alleged that the grand jury continued to sit during the February and March terms for the purpose of finishing investigations begun but not finished during the December Term (R. 2), the court held that such allegations standing alone were insufficient and that it was incumbent upon the Government to

[7] The defendants contended in addition, and the court below held, that as to the fourth count (evasion of 1939 taxes by filing false return on March 15, 1940) the investigations could not possibly have been begun prior to March 15, 1940. But whatever may be said of that count cannot affect the first three counts, and in any event, as will be shown *infra*, pp. 15–17, the 1939 taxes were part of the same general "investigations" theretofore begun within the meaning of the statute.

offer proof in support thereof: "Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment" (R. 190).

4. The court below also ruled that the first four counts of the indictment were duplicitous and inconsistent as to the respondents other than Johnson, in that Johnson was charged with a substantive crime committed on March 15 of each of the years in question whereas the aiders and abettors were charged with a crime consisting of a continuous course of conduct over a period of years. Moreover, the court held the first four counts were further demurrable since, in its view, the co-defendants were charged as accessories both before and after the fact in each count (R. 191-193).

5. As to the first count, involving the year 1936, the court ruled that the evidence did not support the charge and that Johnson's motion for a directed verdict should have been allowed. It also ruled that the motion for a directed verdict on behalf of the co-defendants should have been granted as to the first four counts, since, in its view, there was no evidence that the co-defendants had anything to do with the preparation of Johnson's returns (R. 193-196).

6. Finally, the court held that the testimony of the expert witness Clifford invaded the province of the jury since the questions relating to Johnson's income and taxes were not hypothetical in form.[7]

[7] It was quite clear, however, from the entire testimony, that Clifford's conclusions were based upon figures appear-

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the grand jury was not lawfully constituted in that the order of the District Court extending its sitting to the term at which the indictment was returned was void.

2. In failing to hold that in any event, even if the grand jury were given excessive authority, it nevertheless confined its investigations within permissible limits and that the indictment was therefore valid.

3. In holding that Section 556 of Title 18, United States Code, did not apply to cure any asserted defect in the grand jury proceedings, or any other alleged error or defect occurring in this case.

4. In holding that the respondents' motion to quash and plea in abatement were sufficient to require the Government to answer.

5. In holding that the substantive counts of the indictment as to the respondents other than Johnson were duplicitous and demurrable in that:

> (a) They charged aiding and abetting at times other than the alleged time of the commission of the principal offense by Johnson;

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ing in voluminous exhibits theretofore introduced into evidence; and on cross-examination he was questioned in exhaustive detail as to his "assumptions," among others, that Johnson owned the gambling houses (Tr. 3901), that a certain currency exchange belonged to Johnson (Tr. 3920), and that certain checks cashed at another currency exchange were part of Johnson's income (Tr. 3927-3933).

(b) They charged the respondents other than Johnson as accessories both before and after the fact.

6. In holding that directed verdicts for the respondents other than Johnson should have been granted as to the substantive counts on the ground that there was no evidence that these respondents had assisted in the preparation of Johnson's returns or had any knowledge as to their contents, and in holding that a directed verdict should have been granted for Johnson as to the first count.

7. In holding that the testimony of an expert witness for the Government invaded the province of the jury and constituted reversible error.

8. In reversing the judgments of the District Court.

REASONS FOR GRANTING THE WRIT

The respondent Johnson, a professional gambler of "towering stature in that fraternity" (R. 93), was convicted together with five co-defendants of evasion of large amounts of income taxes after a long jury trial. The verdict was amply supported by the evidence.* The reversal by the

* In support of the charges of tax evasion, the Government produced evidence tending to show Johnson's ownership of a group of gambling houses and offered proof that his expenditures in the years in question greatly exceeded his reported income. The court below held that the proof of his income on the expenditure theory was sufficient to present a jury question except as to the year 1936 (Count 1 of the indictment), but denied that the proof showed he was the owner of the gambling houses and therefore entitled to their proceeds. (R. 194-195.) We believe that this was a clear in-

court below, based primarily upon technical grounds, is, we believe, such a miscarriage of justice as to call for the exercise of this Court's supervisory powers.

1. The holding that the grand jury had no power to sit during the March term is without foundation. The grand jury was impaneled during the December term, and by an order of undisputed validity (January 24) was authorized to continue to sit during the February term to complete its investigations theretofore begun. It had no authority to commence any new investigations in February, nor do the motion to quash or the plea in abatement even allege that any new investigations were commenced in February (R. 28–31, 32–35). The February 28 order continuing the grand jury into the March term in effect authorized it "to finish investigations begun but not finished by said

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vasion of the province of the jury and a substitution by the court below of its own views upon the credibility of witnesses and the weight of the evidence for those of the jury. *Burton* v. *United States*, 202 U. S. 344; *United States* v. *Brown*, 116 F. (2d) 455 (C. C. A. 7th); *United States* v. *Mann*, 108 F. (2d) 354 (C. C. A. 7th). As pointed out by Judge Evans, there was substantial evidence of Johnson's ownership of the gambling houses and the jury found that the income therefrom belonged to Johnson by virtue of that ownership (R. 247). Similarly, the court without justification held that the codefendants' motion for a directed verdict should have been granted as to the first four counts; the evidence connecting the codefendants with Johnson's unlawful acts was more than ample to sustain the verdict.

Grand Jury during the said December 1939 and the said February 1940 Terms * * *" (R. 28, 32). Although this order may perhaps have been inartistically drawn, it is quite plain that when taken in conjunction with the January 24 order and the solemn statement of the grand jury in the indictment to the effect that it continued to sit by order of the court during the February and March terms "for the purpose of finishing investigations begun but not finished during said December term (R. 2)," the February 28 order did not authorize the grand jury to engage in any investigations not commenced during the December Term. The order was therefore valid, and in any event, the indictment was in fact the product of investigations which were begun during the December term, so that even if the grand jury were given excessive authority it actually confined its activities within permissible limits (Bill of Exceptions, Vol. II, pp. 614–692).[5]

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[5] The respondents will no doubt contest this assertion as to the fourth count, involving Johnson's 1939 taxes and return filed on March 15, 1940. But, as will be indicated in Reason 2, infra, p. 15, the term "investigations" must be construed so as to include a broad field of inquiry growing out of a central factual situation. Here, the grand jury was investigating the financial affairs of respondent Johnson, and it was proper, indeed necessary, to complete the investigation up to the present time. The court therefore was obviously wrong in holding that the investigations begun in the December term could not possibly have in-

In these circumstances, it is plain that even if the February 28 order were technically incorrect, the error, if any, was not prejudicial and could not affect the validity of the indictment. Indeed, Section 556, Title 18, U. S. C., unambiguously provides:

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. * * *.

The court refused to apply these provisions, stating without further elaboration that "the question presented is one of substance and not of form" (R. 147), and citing *Crain* v. *United States*, 162 U. S. 625, which has been expressly overruled on this point. *Garland* v. *Washington*, 232 U. S. 642.[11]

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cluded the crime growing out of Johnson's false return which was filed on the following March 15. But even if the grand jury had exceeded its proper authority with respect to that count, it is clear beyond question that the first, second, third and fifth counts were valid.

[11] See also *Bridges* v. *United States*, 240 U. S. 391, 395; *Berger* v. *United States*, 295 U. S. 78; *Breese* v. *United States*, 226 U. S. 1; *Rice* v. *United States*, 35 F. (2d) 689 (C. C. A. 2d); *United States* v. *Austin-Bagley Corp.*, 31 F. (2d) 229 (C. C. A. 2d); *Williams* v. *United States*, 275 Fed. 129 (C. C. A. 9th).

The alleged invalidity of the indictment was the principal ground of reversal and is of such hypertechnical character as to constitute a serious miscarriage of justice in the enforcement of criminal law. We believe it is a matter of such importance as to call for the exercise of this Court's supervisory powers.

2. Although the decision below, to the extent that it merely turns upon the interpretation of the February 28 order, may not have any immediate impact upon other cases, it may have a wide and impeding effect upon grand-jury procedure through its unwarranted interpretation of the word "investigations." The court has held that, as to the fourth count, the crime relating to Johnson's 1939 taxes could not have been committed until March 15, 1940, and, therefore, would require new "investigations."

That interpretation of "investigations" is inconsistent with the traditional and firmly established concept of a grand jury's functions and powers. In *Blair* v. *United States*, 250 U. S. 273, this Court said (p. 282):

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusa-

> tion of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

See also *Hale* v. *Henkel*, 201 U. S. 43; *United States* v. *Thompson*, 251 U. S. 407; *Cobbledick* v. *United States*, 309 U. S. 323; *In re Black*, 47 F. (2d) 542 (C. C. A. 2d); *Shushan* v. *United States*, 117 F. (2d) 110 (C. C. A. 5th), certiorari denied, 313 U. S. 574.

The ruling of the court below substantially impedes the carrying out of an essential function of grand juries, the thorough investigation of complex cases. Under the court's ruling, to insure the legality of an indictment returned other than in the original term, the resulting indictments, including the precise issues and particular defendants, must be anticipated and preliminary investigation begun during the original term as to each crime eventually charged. But, as vividly pointed out in Judge Evans' dissenting opinion, a comprehensive investigation of an involved situation may ultimately reveal crimes wholly unanticipated at the beginning of the grand jury's deliberations. Plainly, Congress must have intended to give it sufficient power to indict with respect to all crimes growing out of the central inquiry.[12]

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[12] The Court's holding largely nullifies the repeated efforts of Congress in enacting and amending the applicable sentence of Section 284 of the Judicial Code (Sec. 421, Tit. 28,

Johnson's 1939 income taxes were part of a single general investigation of his financial affairs, not restricted to any particular year, and undertaken with a view to determine possible income-tax violations. The hypercritical ruling of the majority on this point was properly condemned by the dissenting opinion, and the limitation thus imposed upon the grand jury's powers is of such sweeping character as to call for review by this Court

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U. S. C., as amended). This sentence was added to the Section in 1931. Prior to that time it had been held that the district courts could authorize the grand jury to sit after the expiration of the terms. *United States* v. *Rockefeller*, 221 Fed. 462 (S. D. N. Y.); *Elwell* v. *United States*, 275 Fed. 775 (C. C. A. 7th); and *Johnson* v. *United States*, 5 F. (2d) 471 (C. C. A. 4th). The correctness of these decisions, however, was questioned, and from 1923 on there were regularly introduced in Congress bills authorizing extended sittings for the purpose of permitting the completion by a single grand jury of important investigations, particularly anti-trust investigations. S. Rep. No. 1189, 67th Cong., 4th Sess.; H. Rep. No. 366, 68th Cong., 1st Sess.; S. Rep. No. 1401, 70th Cong., 2d Sess. The bills as introduced used the phrase "business unfinished" rather than the word "investigations" as added by the Senate and finally enacted in 1931. This amendment was stated in the Senate Committee Report to be simply a clarifying one. S. Rep. No. 877, 71st Cong., 2d Sess. In 1940 the sentence in question was amended to extend the period during which the grand jury could sit from three terms to eighteen months in order to permit the conclusion by a single grand jury of complex investigations in judicial districts in which the term was limited to a month's duration. H. Rep. No. 1747, 76th Cong., 3d Sess.

3. As an alternative to its ruling on the second order of continuance, the court below held that the motion to quash and so-called plea in abatement were sufficient to require the Government to answer. At most these preliminary motions alleged only the ultimate conclusion of fact that the investigations of the matters alleged in the indictment had not been begun in the original term of the grand jury (R. 30–31, 34–35). No detailed allegations of fact upon which this conclusion was based were given. No allegations of fact from which prejudice might be inferred were made. Both are fundamental to the sufficiency of preliminary motions. *Hyde* v. *United States*, 225 U. S. 347; *Agnew* v. *United States*, 165 U. S. 36; *Shushan* v. *United States*, 117 F. (2d) 110 (C. C. A. 5th), certiorari denied, 313 U. S. 574; *United States* v. *Parker*, 103 F. (2d) 857 (C. C. A. 3d), certiorari denied, 307 U. S. 642; *Olmstead* v. *United States*, 19 F. (2d) 842 (C. C. A. 9th), affirmed, 277 U. S. 438. See also *United States* v. *McGuire*, 64 F. (2d) 485 (C. C. A. 2d), certiorari denied, 290 U. S. 645; *Colbeck* v. *United States*, 10 F. (2d) 401 (C. C. A. 7th), certiorari denied, *sub. nom. Hackethal* v. *United States*, 270 U. S. 653.

[illegible] The court's decision on the motions likewise fails to give effect to the established principle that a motion to quash is largely addressed to the discretion of the trial court and will not be reviewed except on a showing of an abuse of discretion. *Durland* v. *United States*, 161 U. S. 306; *United States* v. *Hamilton*, 108 U. S. 63; *Shannon* v. *United States*, 80 F. (2d) 620 (C. C. A. 4th); *Sutton* v. *United States*, 79 F. (2d) 563 (C. C. A. [illegible]); *White Hill* v. *United States*, 15 F. (2d) 14 (C. C. A. 8th).

Without a compensating meritorious benefit to the accused, the court's ruling opens the door to dilatory tactics and hopeful delvings into grand jury proceedings. The inevitable result would be unjustifiable delay, violation of the secrecy of grand jury proceedings and extensive fishing expeditions which have been so often condemned by the courts. Such a requirement, we submit, constitutes a wholly unwarranted obstacle to the fair and efficient administration of the criminal laws.

4. The decision of the court below not only requires the Government to answer such motions to quash, but goes further and unconditionally imposes the burden of proving the allegations of the indictment allegations as to the continuance of the grand jury. In the opinion of the court, "* * * failure to prove the allegation with reference to the authority of the Grand Jury to act is likewise fatal." If this be correct, it is incumbent upon the Government to prove as a preliminary matter, perhaps before a petit jury, when the investigation as to each count of an indictment began, what information was before the grand jury at various times and whether its final actions were within the boundaries of the original investigation. The mere statement of this contention bears its own refutation.[1]

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[1] On the trial of a preliminary motion the burden is on the defendant to prove any illegality of the grand jury proceedings. The Government is not required to prove its legality. *Mullaney v. United States*, 79 F. (2d) 502 (C. C.

But if permitted to stand unreversed this holding of the court may work much havoc in the prosecution of criminal cases. Indeed, we are informed that it has already been invoked to pry into the deliberations of a grand jury in an anti-trust proceeding where the Government has been ordered by a district court to prove, before a petit jury, that the investigations during the original term of the grand jury embraced the crimes charged in the indictment returned in the extended term. It is therefore a matter of considerable importance that this issue be reviewed.

5. With respect to the demurrers and motions for directed verdicts of not guilty, the Circuit Court of Appeals held that to establish the crime of aiding and abetting an attempt to evade income tax it is insufficient to charge acts at times other than the time of the commission of the offense (here the time of the filing of the return) and to prove acts committed at such times. The essence of the crime defined in Section 145 (b) of the Revenue Acts of 1934, 1936, and 1938, however, is not the mere filing of a false return. As the statute expressly states, it consists of an attempt to evade income

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A. 1st), certiorari denied, 296 U. S. 658; *Cravens* v. *United States*, 62 F. (2d) 261 (C. C. A. 8th), certiorari denied, 289 U. S. 733. The presumption of legality is not gone, and the burden of proof does not shift to the Government, where the preliminary motion is overruled, or where no preliminary motion is made. Cf. *Carroll* v. *United States*, 16 F. (2d) 951 (C. C. A. 2d), certiorari denied, 273 U. S. 763.

taxes *in any manner*. The filing of a false return is only one means of attempted evasion marking its consummation in point of time. *United States* v. *Noveck*, 273 U. S. 202; *Emmich* v. *United States*, 298 Fed. 5 (C. C. A. 6th), certiorari denied, 266 U. S. 608 The crime also may be committed by filing an amended return (*Levy* v. *United States*, 271 Fed. 942 (C. C. A. 3d)) or by willfully failing to file any return (*United States* v. *Miro*, 60 F. (2d) 58 (C. C. A. 2d)). The crime of attempting to evade, therefore, clearly can be aided by acts unrelated to the preparation or filing of the tax return, and in holding that acts committed at times other than the time of preparation and filing of the return are not aiding and abetting under Section 332 of the Criminal Code (18 U. S. C. Sec. 550), the instant ruling is squarely in conflict with all other decisions interpreting Section 332. *Jin Fuey Moy* v. *United States*, 254 U. S. 189; *Silkworth* v. *United States*, 10 F. (2d) 711 (C. C. A. 2d), certiorari denied, 271 U S. 664; *Reinstein* v. *United States*, 282 Fed. 214 (C. C. A. 2d), certiorari denied, 260 U. S. 722; *Collins* v. *United States*, 20 F. (2d) 574 (C. C. A. 8th); *Smith* v. *United States*, 24 F. (2d) 967 (C. C. A. 5th); *Johnson* v. *United States*, 62 F (2d) 32 (C. C. A. 9th); *Schrader* v. *United States*, 94 F. (2d) 926 (C. C. A. 8th).

The effect of the court's decision, therefore, is to bar completely the application of Section 332 of the Criminal Code to crimes defined under

Section 145 (b) of the Revenue Acts and Internal Revenue Code. The decision leaves available for enforcement of the revenue acts in this field of criminal activity only the crime of aiding and assisting in the filing of a false return, which crime is expressly provided for in what is now Section 3793 of the Internal Revenue Code. The question presented as to the interpretation of Section 332 of the Criminal Code is thus of considerable importance in the administration of criminal tax statutes and should be reviewed by this Court.

6. In ruling that a defendant may not be charged in the same count of an indictment as an accessory both before and after the fact, the court below has further misinterpreted Section 332 of the Criminal Code. Upon this section a person

who aids and abets the commission of a crime is declared to be a principal. As a principal, he is punishable as such. His continued participation in the criminal plan after the commission of the crime does not make him less a principal. Section 333 of the Criminal Code (U. S. C., Title 18, Sec. 551), providing a penalty for accessories after the fact of "one-half the longest term of imprisonment * * * prescribed for the punishment of the principal" can have no application. The decision of the court below is in conflict with *Madigan v. United States*, 23 F. (2d) 180 (C. C. A. 8th). See also *Skelly v. United States*, 70 F. (2d) 483 (C. C. A. 10th); and cf. *Smith v. United States*, *supra*; *Collins v. United States*, *supra*.

7. The court's ruling that the testimony of the Government's expert witness Clifford was prejudicial is so unjust, so arbitrary as to require review by this Court. Clifford was asked to state the amount of Johnson's income for the years in question, and to state the amount of tax due thereon. The court below held that the question should have been hypothetical in form, so as to show that Clifford's conclusions were based upon assumptions that various contested items of income were being attributed to Johnson by the computation. But, as pointed out in the dissenting opinion, the entire line of testimony made it unmistakably clear that Clifford's conclusions were based upon the various exhibits and evidence

theretofore presented in the trial, and that the jury could not possibly have been misled by the form of the questions. Moreover, Clifford was later subjected to a most exhaustive cross-examination by the defendants' counsel in which any vestige of doubt as to his assumptions was completely destroyed. No possible prejudice could have resulted from Clifford's testimony.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DECEMBER 1941.

APPENDIX

Criminal Code:

Sec. 332. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal. (U. S. C., Title 18, Sec. 550.)

Sec. 333. Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years (U. S. C., Title 18, Sec. 551.)

Internal Revenue Code:

Sec. 3793. * * *

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(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in Preparation or Presentation.*—Any person who willfully aids or [illegible]

or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (U. S. C. Supp. V, Title 26, Sec. 3793.)

Judicial Code:

SEC. 269. * * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties (U. S. C., Title 28, Sec. 391).

SEC. 284. * * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms. * * * (U. S. C. Supp. V, Title 28, Sec. 421).

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1703:

SEC. 145. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully

> attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Revenue Act of 1938, c. 289, 52 Stat. 447, 513:

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1936, *supra*.

Revised Statutes:

> SEC. 1025 [as amended by Act of May 18, 1933, c. 31, 48 Stat. 58]: No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, or by reason of the attendance before the grand jury during the taking of testimony of one or more clerks or stenographers employed in a clerical capacity to assist the district attorney or other counsel for the Government who shall, in that connection, be deemed to be persons acting for and on behalf of the United States in an official capacity and function. (U. S. C., Title 18, Sec. 556.)

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